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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

PROHIBITION.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

Statement of the Case.

John S. Low, as next friend of Annie T. K. Parker, a minor, filed an "Amended motion and petition" to remove A. W. Carter as guardian, before George D. Gear, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. The matter was brought and is pending before the Circuit Judge at

Chambers under the provisions of the following laws of Hawaii:

Sections 37 and 38 of Chapter 57 of the Laws of 1892 (Civil Laws Sections 1145-1146), as amended by Sections 11-12 of Act 32 of the Laws of 1903, and also Sections 1343-1395 of the Civil Code of 1859 (Civil Laws Chapter 126) as amended by Act 16 of the Laws of 1903. (Decision of Hawaiian Supreme Court, Transcript 22.)

These laws are stated in full hereafter. It is admitted that if valid they confer upon the Circuit Judge at Chambers power to hear and determine matters of this nature.

While this matter was pending before the Circuit Judge at Chambers, a petition for a Writ of Prohibition against the present defendants in error was filed in the Supreme Court of the Territory of Hawaii and a preliminary Writ of Prohibition was issued. The ground for prohibition as set forth in the petition, exclusive of formal allegations, was:

"That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at Chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with section 81 of an act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30, 1900, and reading as follows: 'Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

Upon final hearing the Supreme Court of the Territory of Hawaii denied the permanent Writ of Prohibition and dissolved the temporary writ. Its decision was based exclusively on the ground that the Hawaiian statutes in question were not in conflict with the section of the Organic Act above quoted but were valid From this decision and decree the plaintiff in error sued out a Writ of Error to this court.

II.

Statement of Errors Relied Upon.

The errors relied upon, as appear from the assignment of errors on file (Transcript, page 38), are as follows:

"First. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at Chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court are not in conflict with and in violation of the provisions of section 81 of an Act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900, and commonly known as 'the organic act of the Territory of Hawaii.'

"Second. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at Chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court were not repealed by said act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900,

and commonly known as 'the organic act of the Territory of Hawaii;'

"Third. That the court erred in holding that the provisions of sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892; sections 1343 to 1395 of the Civil Code of 1859; act 16 of the Session Laws of the Territory of Hawaii for 1903; and sections 11 and 12 of act 32 of the Session Laws of the Territory of Hawaii for 1903, and each of said sections and acts are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900, and commonly known as 'the organic act of the Territory of Hawaii;'

"Fourth. That the court erred in holding that the Honorable George D. Gear, second judge of the circuit court of the first circuit, at Chambers, had jurisdiction of the proceedings to remove Alfred W. Carter as guardian of the property of Annie T. K. Parker, a minor;

"Fifth. That the court erred in ordering judgment to be entered and in entering judgment denying a permanent writ of prohibition and dissolving the temporary writ issued herein on the 7th day of September, A. D. 1904."

The question to be presented to this court, therefore, may be broadly stated as a single question, to-wit, the validity or invalidity under section 81 of the Organic Act of the Territory of Hawaii of the above mentioned laws of the Territory of Hawaii, which are here printed in full.

Sections 37 and 38 of Chapter 57 of the Laws of 1892.

CIRCUIT JUDGES IN CHAMBERS.

Section 37. The Judges of the several Circuit Courts shall have power in Chambers within their respective jurisdictions, but subject to appeal to the Circuit and Supreme Courts according to law, as follows:

First. To hear and determine all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a remedy at law, where such remedy exists;

Second. To hear and determine all matters in Equity;

Third. To hear and determine all matters in bankruptcy;

Fourth. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator, or guardian; to determine the heirs at law of deceased persons and to decree the distribution of interstate estates;

Fifth. To admeasure dower and partition real estate; when the dower in real estate cannot be set apart without great injury to the owners, the Judge may ascertain the value of such dower in money, and order the same to be paid in such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the Judge may order a sale of the premises and divide the proceeds;

Sixth. To legalize the adoption of children and to decree the affiliation of bastards;

Seventh. To select and impannel—subject to challenge for cause by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo,* or in any other matter to be tried before any of said Judges in Chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require;

Eighth. To issue writs of *habeas corpus* according to law;

Ninth. To issue writs of error, *certiorari, mandamus nc exeat regno,* prohibition and *quo warranto,* and all other writs and processes, to Courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws;

Tenth. To enlarge on bail persons rightfully confined in all bailable cases;

Eleventh. To require either the plaintiff or defendant, upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the Judge shall deem just;

Twelfth. To issue warrants for the apprehension, in any part of the Kingdom, of any person accused under oath of a crime or misdemeanor committed within his jurisdiction and to examine and commit such person to prison according to law, for trial.

Section 38. Provided, however, that the powers and jurisdiction of Circuit Courts and of Circuit Judges in Chambers relating to causes of a civil nature as hereinbefore defined, shall be limited, as follows:

First. Causes described in the second division of Section 36 shall be triable only in the Circuit where it is alleged the penalty or forfeiture was incurred;

Second. Causes of divorce, separation, or nullity of marriage, which shall be triable only in the Circuit

where the parties last lived together as man and wife;

Third. Causes of bankruptcy, which shall be heard only in the Circuit where the alleged bankrupt has had his business headquarters, or in the First Circuit;

Fourth. Proceedings for the probate of wills and for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, which shall be brought only in the Circuit where the deceased had his last residence, or in the First Circuit;

Fifth. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, which shall be brought in the circuit where the person or a majority of the persons reside, in behalf of whom such proceedings are begun;

Sixth. Proceedings for the partition of real estate, which shall be brought only in the Circuit where the real estate, partition of which is prayed for, is situated, or in the First Circuit;

Seventh. The power of legalizing the adoption of children, and decreeing the affiliation of bastards, shall be in the Judge of the Circuit where the parents of the child in question reside;

Eighth. The power of issuing writs as provided in the ninth division of Section 37, shall be in the Judge of the Circuit in which the alleged occasion for relief by any such writ, shall arise. Provided, however, that in case any such writ shall be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any Circuit Court or Judge, the power of issuing such writ shall be in the Court or Judge before whom such cause or proceeding has been begun or is pending, even though the alleged occasion for relief shall have arisen in another Circuit.

(These are Sections 1145 and 1146 of the Civil Laws of 1897.)

Sections 11 and 12 of Act 32 of the Laws of 1903.

SECTION 11. Section 37 of said chapter LVII (Civil Laws, Sec. 1145), is hereby amended so as to read as follows:

"SECTION 37. The judges of the several Circuit Courts shall have power at Chambers within their respective jurisdictions, but subject to appeal to the Circuit and Supreme Courts, according to law, as follows:

"First. To hear and determine all matters in equity;

"Second. To hear and determine all matters of divorce, separation and annulment of marriage;

"Third. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians, to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator, or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates;

"Fourth. To admeasure dower and partition real estate; when the dower in real estate cannot be set apart without great injury to the owners, the judge may ascertain the value of such dower in money, and order the same to paid on such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the judge may order a sale of the premises and divide the proceeds;

"Fifth. To legalize the adoption of children and to decree the affiliation of bastards:

"Sixth. To select and impannel, subject to challenge, for cause, by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo*, or in any other

matter to be tried before any of the said judges at Chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require;

"Seventh. To issue writs of habeas corpus according to law:

"Eighth. To issue writs of error, *certiorari*, *mandamus*, *ne exeat regno*, prohibition and *quo warranto*, and all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law.

"Ninth. To enlarge on bail persons rightfully confined in all bailable cases;

"Tenth. To require either the plaintiff or defendant upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the judge shall deem just;

"Eleventh. To issue warrants for the apprehension, in any part of the Territory, of any person accused under oath of a crime or misdemeanor committed in any part of the Territory and to examine and commit such person to prison according to law, for trial before the Circuit Court of the circuit in which the offense was committed, to fix bail and generally to perform the duties of a committing magistrate."

Section 12. Section 38 of said chapter LVII (Civil Laws, Sec. 1146), as amended by act 56 of the laws of 1898, is hereby amended so as to read as follows:

"Section 38. Provided, however, that the power and jurisdiction of Circuit Courts and Circuit Judges in Chambers relating to causes of a civil nature as hereinbefore defined, shall be limited as follows:

"First. Causes described in the second division of Section 36 shall be triable only in the Circuit where it is alleged the penalty or forfeiture was incurred;

"Second. Actions of ejectment, actions to quiet title

in real property and actions of trespass *quare clausum fregit* shall be triable only in the Circuit in which the real property in question is situated;

"Third. Causes of divorce, separation, and nullity of marriage, shall be triable only in the Circuit where the parties last lived together as man and wife, or, if they have not last so lived together in this Territory, in the Circuit in which the applicant resides;

"Fourth. Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, shall be brought only in the Circuit where the deceased had his last domicile. Provided, that if the deceased was last domiciled without this Territory, the proceeding may be brought in any Circuit in which there is estate to be administered;

"Fifth. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the Circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun. Provided, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any Circuit in which there is estate of such person or persons;

"Sixth. Proceedings for the partition of real estate shall be brought only in the Circuit where the real estate, partition of which is prayed for, is situated. Provided, that if such real estate lies in more than one Circuit the proceedings may be had in any Circuit in which the same or any part thereof is situated;

"Seventh. Proceedings for legalizing the adoption of children and decreeing the affiliation of bastards, shall

be brought in the Circuit in which the parents, or either of them, of the children in question reside. Provided, that if, in case of adoption, such parents are deceased or if neither of them resides within the Territory the proceedings may be brought in the Circuit in which the adopting parent or parents reside;

"Eighth. The power of issuing writs of error and other writs specifically named in the eighth sublivision of section 37, as amended, shall be in the Judge of the Circuit in which the alleged occasion for relief by any such writ be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any Circuit Court or Judge, the power of issuing such writ shall be in the Court or Judge before whom such case or proceeding has been begun or is pending, even though the alleged occasion for relief shall have arisen in another Circuit."

Chapter XXIX. Civil Code of 1859.

OF GUARDIANS AND WARDS.

Section 1342. Any Judge of the Supreme Court of law and equity, when it shall appear to him necessary or convenient, may appoint guardians to minors and others, being inhabitants of or residents in any part of this kingdom, or who may reside without this kingdom, and have any estate within the same.

Section 1343. Any Circuit Judge of this kingdom may, when it shall appear to him necessary or convenient, appoint guardians to minors and others, being inhabitants of or residents in the Circuit in which he is a Judge.

Section 1344. If the minor is under the age of thirteen years, the judge of probate may nominate and appoint his guardian, and if he is above the age of thirteen years, he may nominate his own guardian, who, if

approved of by the judge, shall be appointed accordingly, and if the guardian, nominated by such minor, shall not be approved by the judge, or if the minor shall reside without the kingdom, or if after being cited by the judge, he shall neglect to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner, as if the minor were under the age of thirteen years.

Section 1345. Every guardian appointed as aforesaid, shall have the custody and tuition of the minor, and the care and management of his estate, and shall continue in office until the minor shall arrive at the age of twenty years, or until the guardian shall be discharged according to law; provided, however, that the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to the custody of the person of the minor, and to the care of his education.

Section 1346. Every such guardian shall give a bond, with surety or sureties, to the judge of probate, in such sum as the judge shall order, with conditions as follows:

First. To make a true inventory of all the real estate, and all the goods, chattels, rights and credits of the ward, that shall come to his possession or knowledge, and to return the same into the probate court at such times as the judge shall order;

Secondly. To dispose of and manage all such estate and effects according to law, and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the custody, education and maintenance of the ward;

Thirdly. To render an account, on oath, of the property in his hands, including the proceeds of all real es-

tate sold by him, and of the management and disposition of all such property, within one year after his appointment, and at such times as the judge of probate shall direct;

Fourthly. At the expiration of his trust, to settle his accounts with the judge of probate, or with the ward, or his legal representatives, and to pay over and deliver all his estate and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto.

Section 1347. Every father may, by his last will in writing, appoint a guardian or guardians for any of his children, whether born at the time of making the will, or afterward, to continue during the minority of the child, or for any less time, and every such testamentary guardian shall have the same powers, and shall perform the same duties, with regard to the person and the estate of the ward, as a guardian appointed by the judge of probate.

Section 1348. Every such testamentary guardian shall give a bond in like manner, and with like condition, as is before required of a guardian appointed by the judge of probate, provided that when the testator, in the will appointing the guardian, shall have ordered or requested that such bond shall not be given, the bond shall not be required, unless from a change in the situation or circumstances of the guardian or for other sufficient cause, the judge of probate shall think proper to require it.

Section 1349. Nothing contained in this chapter shall impair or affect the power of any judge of the Supreme Court, or Circuit Court, to appoint a guardian to defend the interests of any minor impleaded in such court, or interested in any suit or matter there pending, nor their power to appoint or allow any person as next

friend for a minor, to commence, prosecute, or defend any suit in his behalf.

Section 1350. When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned, to have a guardian appointed for him, the judge shall cause notice to be given to the supposed insane person, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed, and if after a full hearing, it shall appear to the judge that the person in question is incapable of taking care of himself, the judge shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

Section 1351. Every guardian so appointed for an insane person, shall have the care and custody of the person of the ward, and management of all his estate, until the guardian shall be legally discharged, and he shall give bond to the judge appointing him, in like manner, and with the like condition, as is before prescribed with respect to the guardian of a minor, excepting that the provision relating to the education of the ward, shall be omitted in the condition of the bond.

1352. When any person by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste or lessen his estate, as to expose himself or his family to want or suffering, his friends or relations may present a complaint to any of the judges hereinbefore mentioned, setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him.

1353. The judge shall cause notice to be given to such supposed spendthrift, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed; and if, after a full hearing, it shall appear to the judge that the person

complained of comes within the description contained in section 1352, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

Section 1354. After the order of notice has been issued, the complainants may cause a copy of the complaint, with the order of notice, to be filed in the office of the registrar of conveyances, and if a guardian shall be appointed upon such application, all contracts, excepting for necessaries, and all gifts, sales or transfers, of real or personal estate, made by such spendthrift after such filing of the complaint in the registry of conveyances, and before the termination of the guardianship, shall be null and void.

Section 1355. When a guardian shall be appointed for an insane person, or spendthrift, the judge shall make an allowance to be paid by the guardian, for all reasonable expenses incurred by the ward in defending himself against the complaint.

Section 1356. Every guardian, so appointed for a spendthrift, shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged, and he shall give bond to the judge appointing him, in like manner and with the like condition, as is before directed with respect to the guardian of an insane person.

Section 1357. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, shall pay all just debts due from the ward, out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as hereinafter provided; he shall also settle the accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approba-

tion of any of the judges hereinbefore specified, compound for the same, and give a discharge to the debtor, upon receiving a fair and just dividend of his estate and effects, and he shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend.

Section 1358. The guardian shall also manage the estate of the ward frugally, and without waste, and apply the income and profits thereof, so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits shall be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family.

Section 1359. The guardian may join in and assent to a partition of the real estate of the ward, either upon a petition for partition, or otherwise; and he may assign and set out dower in the said estate to any widow entitled thereto, and may appoint an appraiser of real estate on any execution, either against or in favor of his ward.

Section 1360. Upon the taking of any inventory, required by this chapter, the estate and effects comprised therein shall be appraised by three suitable persons, to be appointed and sworn by the judge, and every guardian shall account for, and dispose of, the personal estate of the ward, as directed by the judge.

Section 1361. When any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become insane or otherwise incapable of discharging his trust, or evidently unsuitable therefor,

any of said judges, after notice to such guardian, and to all others interested, may remove him; and every guardian may, upon his request, be allowed to resign his trust, when it shall appear to the judge proper to allow the same; and upon every such resignation or removal, and also upon the death of any guardian, the judge of probate may appoint another in his stead.

Section 1362. The marriage of any female who is under guardianship, as a minor, shall operate as a legal discharge to her guardian; and the guardian of any insane person, or spendthrift, may be discharged by any judge of probate, when it shall appear to him, on the application of the ward, or otherwise, that such guardianship is no longer necessary.

Section 1363. Any court of probate may require a new bond to be given by any guardian, and may discharge the existing sureties from future responsibility, whenever such court may deem it proper so to do.

Section 1364. Any bond given by a guardian, may be put in suit by order of a judge of probate, for the use and benefit of the ward, or of any person interested in his estate.

Section 1365. No action shall be maintained against the sureties in any bond, given by a guardian, unless it be commenced within four years from the time when the guardian shall be discharged, provided that if at the time of such discharge, the person entitled to bring such action shall be out of the kingdom, the action may be commenced at any time within four years after his return to the kingdom.

Section 1366. Upon complaint made to a judge of probate by any guardian, or by the ward, or by any creditor or other person interested in the estate, or by any persons having claims thereto in expectancy as heir or otherwise, against anyone suspected of having concealed,

embezzled, or conveyed away any of the money, goods or effects of the ward, the judge may cite and examine such suspected person, and proceed with him as to such charge, in the same manner as with persons suspected of concealing or embezzling, the effects of a deceased testator or intestate.

Section 1367. When any minor, or other person liable to be put under guardianship, according to the provisions of this chapter, shall reside without this kingdom, and shall have any estate therein, any friend of such person, or anyone interested in his estate, in expectancy or otherwise, may apply to any judge of the Supreme Court of law and equity, and after notice to all persons interested, to be given in such manner as the judge shall order, and after a full hearing and examination, if it shall appear to him proper, he may appoint a guardian for such absent person.

Section 1368. Every guardian appointed according to the provisions of the last preceding section, shall have the same powers and duties, with respect to any estate of the ward, that shall be found within the kingdom, and also with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian, appointed under this chapter.

Section 1369. Every such guardian shall give bond to the judge appointing him, in like manner and with the like conditions, as is above provided with respect to other guardians; excepting that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, shall be confined to such estate and effects as shall come to his hands in this kingdom, and that the provisions respecting the custody of the ward, shall not be applicable, unless the ward shall come to reside within this kingdom.

Section 1370. Every guardian shall be allowed the

amount of all his reasonable expenses, incurred in the execution of his trust, and he shall also have such compensation for his services, as the court, in which his accounts are settled, shall consider to be just and reasonable.

Section 1371. When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same, upon the oath of any one of them.

Section 1372. The words "insane person," are intended to include every idiot, non-compos, lunatic, and distracted person, and the word "spendthrift" is intended to include every one who is liable to be put under guardianship, on account of excessive drinking, gaming, idleness or debauchery; and these words shall be so construed in all the provisions relating to guardians and wards, contained in this or any other statute.

Section 1373. When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall be insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided.

Section 1374. When it shall appear, upon the representation of any such guardian that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof be put on interest, or invested in some productive stock, his guardian may sell the same accordingly, upon obtaining a license therefor, and proceeding therein as hereinafter provided.

Section 1375. If the estate is sold for the maintenance of the ward and his family, as provided in section 1358, the guardian shall apply the proceeds of the sale to that purpose, as far as necessary, and shall put out the

residue, if any, on interest, or invest it in the best manner in his power, until the capital shall be wanted for the maintenance of the ward and his family, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Section 1376. If the estate is sold, in order to put out and invest the proceeds, as provided in section 1374, the guardian shall make the investment according to his best judgment, or in pursuance of any order that may be made relating thereto, by the court granting him the license to sell.

Section 1377. In every case of the sale of real estate, as provided in this chapter, the residue of the proceeds, if any, remaining upon the final settlement of the accounts of the guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons and in the same proportion, as the real estate would have been, if it had not been sold.

Section 1378. Such license, in either of the cases aforesaid, may be granted by any judge of the Supreme Court of law and equity, or by any circuit judge of the island in which the estate intended to be sold lies; but in cases where the ward resides without the kingdom, such license shall be granted only by a judge of the Supreme Court of law and equity.

Section 1379. In order to obtain such license, the guardian shall present to the court a petition, setting forth the condition of the estate, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale; and if after a full examination, on the oath of the petitioner, or otherwise, it shall appear to the court, either that it is necessary, or that it would be for the benefit of the ward, that the real estate or any part of it should be sold, the

court may grant a license therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or in order that the proceeds may be put out and invested as aforesaid.

Section 1380. No such license shall be granted until notice by public advertisement or otherwise, as the court shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate, to appear and show cause why the same should not be granted.

Section 1381. Every guardian licensed to sell real estate as aforesaid, shall, before the sale, give bond to the judge granting the license, with sufficient surety or sureties, with condition to sell the same in the manner prescribed by the judge, and to account for and dispose of the proceeds of the sale, in the manner provided by law.

Section 1382. Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment, in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same, in such manner as will be most for the advantage of all persons interested therein.

Section 1383. He shall also give public notice of the time and place of sale, by causing notifications thereof to be posted up in the most public places, on the island where the estate to be sold is, and if it be on the island of Oahu, he shall also cause a notice of such sale to be published in the Government Gazette, at least fourteen days previous to the day of sale.

Section 1384. A copy of such notification certified by the oath of the guardian, or of the person employed by him to give such notice, being made before any judge of

probate, and filed in his office, within one year after the sale, shall be admitted as evidence of the time, place and manner of giving notice.

Section 1385. No license granted in pursuance of this chapter, shall be in force for more than one year after the time of granting the same.

Section 1386. When any minor, insane person, or spendthrift, residing without the kingdom, shall be put under guardianship in the country in which he resides, and shall have no guardian appointed in this kingdom, the foreign guardian may file an authenticated copy of his appointment, in the Supreme Court of law and equity, after which he may be licensed by any judge of the said court, to sell the real estate of the ward, in any part of this kingdom, in the same manner and on the same terms and conditions as are prescribed in this chapter, in the case of a guardian appointed in this kingdom, excepting in the particulars hereinafter mentioned.

Section 1387. Every foreign guardian, so licensed to sell real estate, shall take and subscribe the oath required in like case of guardians appointed in this kingdom, and shall give notice of the time and place of sale, and conduct the same in the manner prescribed for guardians appointed here, and may perpetuate the evidence of the notice in the same manner.

Section 1388. All the proceedings required to be had in any probate court in this kingdom, respecting such sale by a foreign guardian, shall be had in the Supreme Court of law and equity.

Section 1389. Upon every such sale by a foreign guardian, the proceeds of the sale, or as much thereof as may remain upon the final settlement of the guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons, as

the real estate would have been, according to the laws of this kingdom, if it had not been sold; and the foreign guardian shall in every case, before making the sale, give bond, with sufficient surety or sureties, to the judge granting the license to sell, with condition to account for and dispose of the same accordingly.

Section 1390. If any person shall appear and object to the granting of any license, prayed for under the provisions of this chapter, and if it shall appear to the court or judge, that either the petition, or the objection thereto, is unreasonable, they may in their discretion, award costs for the party prevailing in the case.

Section 1391. No action for the recovery of any estate, sold by a guardian under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship; and no entry shall be made, unless by judgment of law, upon any lands sold as aforesaid, with a view to avoid the sale, after the expiration of the said five years; excepting only, that persons out of the kingdom, and minors and others under any legal disability to sue at the time when the right of action or of entry shall first accrue, may commence their action or make their entry, at any time within five years after the removal of the disability, or after their return to this kingdom.

Section 1392. In case of an action relating to any estate, sold by a guardian, under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

First. That the guardian was licensed to make the sale, by a judge of competent jurisdiction.

Secondly. That he gave a bond, which was approved by the judge of probate, in case any bond were required by the court, upon granting the license.

Thirdly. That he took the oath prescribed in this chapter.

Fourthly. That he gave notice of the time and place of the sale, as prescribed herein.

Fifthly. That the premises were sold accordingly by public auction, and are held by one who purchased them in good faith.

Section 1393. If in relation to such sale, there should be any neglect or misconduct in the proceedings of the guardian, by which any person interested in the estate shall suffer damage, such aggrieved party may recover compensation therefor, in a suit on the guardianship bond, or otherwise, as the case may require.

Section 1394. If the validity of any sale, made by a guardian under the provisions of this chapter, shall be drawn in question by any person claiming adversely to the title of the ward, the sale shall not be held void, on account of any irregularity in the proceedings, provided it shall appear that the guardian was licensed to make the sale, by a judge of competent jurisdiction, and that he did accordingly execute and acknowledge, in legal form, a deed of conveyance of the premises.

Section 1395. All sales, exchanges, transfers, gifts and conveyances of any estate or portion of an estate, of any ward of this kingdom, which may have been made by any guardian of such ward, previous to the fourth day of August, A. D. 1851, shall be and the same are hereby confirmed as legal and valid.

(Section 1342 was repealed by Chapter 57 of the Laws of 1892. The remaining sections constitute Chapter 126 of the Civil Laws of 1897.)

Act 16. Laws of 1903.

AN ACT relating to Guardians and Wards.

Be it enacted by the Legislature of the Territory of Hawaii.

Section 1. Section 1343 of the Civil Code (Civil Laws, Sec. 1956) is hereby amended so as to read as follows:

"Section 1343. Circuit Judges shall have judisdiction to appoint guardians to minors and others according to Law."

Section 2. Section 1349 of the Civil Code (Civil Laws, Sec. 1962) is hereby amended so as to read as follows:

"Section 1349. Nothing contained in this Chapter shall impair or affect the power of any court or judge to appoint a guardian to defend the interests of any minor impleaded in such court or before such judge, or interested in any suit or matter there pending, or their power to appoint or allow any person as next friend for a minor, to commence, prosecute, or defend any suit in his behalf."

Section 3. Section 1367 of the Civil Code (Civil Laws, Sec. 1980) is hereby amended so as to read as follows:

"Section 1367. When any minor or other person liable to be put under guardianship according to the provisions of this Chapter, shall reside without this Territory, and shall have any estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to a Circuit Judge in any Circuit in which there is property belonging to such minor or other person and, after notice to all persons interested, to be given in such manner as the Judge shall order or as shall be required by law or rule of Court, and after a full hearing and examination, if it shall appear

to him proper, he may appoint a guardian for such absent person."

Section 4. Section 1378 of the Civil Code (Civil Laws, Sec. 1991) is hereby amended so as to read as follows:

"Section 1378. Such license in either of the cases aforesaid may be granted by any Circuit Judge of the Circuit in which any of the estate intended to be sold lies."

Section 5. Section 1386 of the Civil Code (Civil Laws, Sec. 1999) is hereby amended so as to read as follows:

"Section 1386. When a minor, insane person, or spendthrift residing without the Territory, shall be put under guardianship in the country in which he resides, and shall have no guardian appointed in this Territory, the foreign guardian may file an authenticated copy of his appointment in the Circuit Court of any Circuit in which there is property belonging to such minor, insane person, or spendthrift, after which he may be licensed to sell the real estate of the ward, and may otherwise act, in the same manner and on the same terms and conditions as are prescribed in this Chapter in the case of a guardian appointed in this Territory, excepting in the particulars hereinafter mentioned."

Section 6. Sections 1344, 1346-1348, 1361-1364, 1366, 1370, 1371, 1376, 1379, 1380, 1383 (as amended by Chapter XXXIV of the Laws of 1874), 1384, 1390 and 1392 of the Civil Code (Civil Laws, Secs. 1957, 1959-61, 1974-1977, 1979, 1983, 1984, 1989, 1992, 1993, 1996, 1997, 2003 and 2005) are hereby amended by striking therefrom the words "of probate" and "Court" wherever they occur and by inserting in lieu of the word "court" where so stricken out the word "Judge."

Section 7. Section 1388 of the Civil Code (Civil Laws, Sec. 2001) is hereby repealed.

Section 8. This act shall take effect on the day of its approval.

Approved this 1st day of April, A. D. 1903.

SANFORD B. DOLE,
Governor of the Territory of Hawaii.

The question to be presented, therefore, is whether or not the foregoing statutes of the Territory of Hawaii, purporting to confer jurisdiction upon circuit judges at chambers, to hear and determine judicial matters not incident or ancillary to a cause pending in any court, are null and void, being in contravention with section 81 of the Organic Act of the Territory of Hawaii.

III.

Brief of the Argument.

A. Decisions under similar Constitutional Provisions.

Section 81 of the Organic Act of the Territory of Hawaii is practically identical with the constitutional provisions of many States, and under these constitutional provisions similar statutes, purporting to confer upon circuit judges at chambers, judicial power not incident or ancillary to a cause pending in any court, have invariably been declared unconstitutional.

"Sec. 81. That the judicial power of the Territory shall be vested in one Supreme Court, Circuit Courts, and in such inferior Courts as the Legislature may from time to time establish. And until the Legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several Courts and their jurisdiction and

procedure shall continue in force except as herein otherwise provided." Section 81 of the Organic Act of the Territory of Hawaii.

The Organic Act of the Territory takes the place of a constitution as the fundamental law of the local government.

> Natonal Bank *vs.* County of Yankton, 101 U. S., 129, 133.

No Hawaiian law relating to the judiciary, whether previously existing or subsequently enacted, can stand if in conflict with the provisions of that act.

> 23 Ops. Atty. Gen., 539.

A clause like the one in question is an entire distribution of the judicial power and the legislature cannot vest any portion of it elsewhere.

> Cooley, Constitutional Limitations (7th Ed.), 129, Note 3.

An examination of the cases cited by Cooley shows a constant tendency of the legislature to vest judicial power in various State officers, from mayors to notaries public, which statutes are invariably declared void by the courts. Although the reasoning in these cases fully supports our contention, we confine our own citations to cases directly in point, that is, cases in which judicial power not incident or ancillary to any cause pending in the court has been conferred by statute upon circuit judges at Chambers.

California:

"The judicial power of the State shall be vested in the Senate sitting as a Court of Impeachment, in a

Supreme Court, Superior Courts, Justices of the Peace, and such inferior Courts as the Legislature may establish in any incorporated City or town or City and County." Article 6, Section 1, Constitution of California.

Under this provision of the Constitution a statute giving to a county judge power to decide questions of eminent domain and to assess damages in condemnation proceedings has been held to be unconstitutional.

"The question, therefore, arises whether under the constitution the Legislature has competent power to create a tribunal and confer upon it jurisdiction in special cases; for it is beyond question that the County Judge is not the County Court, and although the Legislature may authorize the Judges of the several courts to perform certain duties at Chambers in respect to proceedings in a cause yet some Court has jurisdiction of the cause, and the Judge in Chambers, whether of the same or another Court, acts as a Commissioner or in some other capacity merely in aid of and subordinate to the Court having jurisdiction of the cause. It being admitted beyond dispute that a County Judge is not a County Court, if jurisdicition of special cases could be conferred upon the County Judge, it is equally competent the Legislature to confer it upon the County Clerk, Recorder or Sheriff, or to create a new tribunal for the exercise of such jurisdiction. . . . It is our opinion that the Legislature is not authorized to provide for the exercise of such jurisdicition by any tribunal other than one of the Courts provided for by the constitution, and that a statute which grants such jurisdiction to a judicial officer cannot be upheld."

Spencer Creek Water Company *vs.* Vallejo, 48 Cal., 70.

Michigan:

"The judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts, and in Justices of the Peace. Municipal Courts of Civil and Criminal jurisdiction may be established by the Legislature in Cities." Article 6, Section 1, Constitution of Michigan.

Under this provision an Act of the Legislature gave certain judicial powers to Circuit Judges at Chambers in connection with the distribution of an insolvent debtor's estate. This act was held unconstitutional.

"But the exercise of judicial power in its strict legal sense can be conferred only upon Courts named in the constitution. The judicial power referred to is the authority to hear and decide controversies and to make binding orders and judgments respecting them. . . . A statute which confers such judicial powers upon a Circuit Judge at Chambers is clearly in conflict of Article 6, Section 1 of the constitution."

Risser *vs.* Hoyt, 53 Mich., 185.

A later Michigan statute concerning Eminent Domain was also declared unconstitutional on the ground that it conferred judicial power upon Circuit Judges at Chambers.

"Under our constitution such powers as are strictly judicial in their character can only be vested in Circuit Courts which are named in the constitution itself. The Circuit Courts, as Courts, have such powers; the Judges, as Judges out of Court, do not possess them and cannot be vested with them."

Toledo Railway Company *vs.* Dunlap, 47 Mich., 456.

A further provision of the Michigan Constitution gives

the Legislature the right to vest in certain persons judicial powers not exceeding those of a Circuit Judge at Chambers. These persons, who are called "Circuit Court Commissioners," being thus placed by the constitution on exactly the same footing as a Circuit Judge at Chambers, cases relating to them are directly in point. A statute authorizing these Commissioners to issue writs of habeas corpus under which it became necessary to adjudicate the right to the custody of children was held to be unconstitutional, Judge Cooley delivering the opinion:

"The principal question in this case concerns the power of a Circuit Court Commissioner under habeas corpus to adjudicate on the right to the custody of children as between the parents. The constitution vests the judicial power in one Supreme Court, in Circuit Courts, in Probate Courts, and in Justices of the Peace, but allows Municipal Courts to be established in Cities; Article 6, Section 1. It also declares that 'The Legislature may provide by law for the election of one or more persons in each organized County who may be vested with judicial powers not exceeding those of a Circuit Judge at Chambers,' Article 6, Section 16. It is under this last section that the power in question is supposed to be authorized. . . . The Circuit Court seldom is called upon to exercise a more important authority, and if it can be transferred to a Commissioner as a mere Chamber duty it is not easy to see why any other power which that Court exercises may not be transferred to him also, by simply dispensing with the forms of trial prescribed for the attainment of justice and making the proceedings summary. We regard the case of Waldby *vs.* Calendar (8 Mich., 430) as governing this, and the proceeding must be quashed."

Rowe *vs.* Rowe, 28 Mich., 353.

Ohio:

"The judicial power of the State is vested in the Supreme Court, Circuit Courts, Courts of Common Pleas, Courts of Probate, Justices of the Peace, and such other Courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Article 4, Section 1, Constitution of Ohio.

The same question arose in Ohio under a statute giving Judges at Chambers certain judicial powers under an eminent domain act and the statute was declared unconstitutional. The Court said:

"Now the provision of the constitution is that the several judges of this Court shall have and exercise such power and jurisdiction at Chambers as may be directed by law; and the question arises whether a capacity is thereby conferred on the members of this Court to receive at the hands of the Legislature a Chamber jurisdiction in causes pending in other courts of which the Judges of this Court are not members. We all concur in answering this question in the negative. Jurisdiction at Chambers is incidental to and grows out of the jurisdiction of the Court itself. It is the power to hear and determine out of Court such questions arising between the parties to a controversy as might well be determined by the Court itself but which the Legislature has seen fit to entrust to the judgment of a single Judge out of Court without requiring them to be brought before Court in actual session. It follows that the jurisdiction of a Judge at Chambers cannot go beyond the jurisdiction of the Court to which he belongs or extend to matters with which his Court has nothing to do. And the constitution in granting such jurisdiction at Chambers to the Judges of the several Courts of the State as may be directed by law is to be understood as limiting the jurisdiction of each to such subject matters as are within the jurisdic-

tion of his proper Court and to which it is *ex vi termini* limited."

Pittsburg, etc., Ry. Co., *vs.* Hurd, 17 Ohio State, 144-146.

Missouri:

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, Circuit Courts, Criminal Courts, Probate Courts, County Courts and Municipal Corporation Courts." Article 6, Section 1, Constitution of Missouri.

Under this provision the question arose as to the validity of a statute giving Judges at Chambers certain judicial powers relative to the winding up of Building and Loan Associations and the decision was that the statute was unconstitutional.

"By our constitution the judicial power of the State, as to matters of law and equity, except as in the constitution itself otherwise provided, is vested in certain Courts therein named; (Const., Art. 6, Section 1). The word 'Court' is there used in its technical sense. A Court is a judicial assembly. The Judge of the Court is its presiding officer. While the Judge is often called "the Court" yet he is only so rightly called when the tribunal over which he presides is in session. Bouvier gives to the word 'Court' this definition, 'A body in the Government to which the administration of public justice is delegated. The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time engaged in the full and regular performance of its functions.' . . . It is contended that our statutes confer on the Judge the authority to hear and determine the whole

issues in a case of this kind in vacation. If there is such a statute it is in violation of Section I, Article 6 of our constitution above quoted. In that section the constitution disposes of all the judicial power of the State in matters of law and equity, and it leaves nothing to be disposed of by the General Assembly. This is the view the Supreme Court of Michigan took of the same subject; that Court said 'By Article 6, Section 1 of our constitution the judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts and in Justices of the Peace. . . . Section II of this Act confers upon the Judge in vacation the authority to hear and determine summarily upon the question of the insolvency of the debtor, the giving or attemping to give preferences, his refusal or neglect to make assignment of his property and his orders and judgment (if he makes any) are final and conclusive. . . . A statute which confers such judicial powers upon a Circuit Judge at Chambers is clearly in conflict with Article 6, Section I of the constitution,' Risser *vs.* Hoyt, 53 Mich., 185."

State *vs.* Woodson, 161 Mo., 444, 453-455.

It will thus be seen that the Courts are unanimous in holding that under constitutional provisions similar to our Organic Act the word "Court" does not include a Judge at Chambers, and that it is not competent for the legislature to vest in Judges at Chambers any judicial power not incident or ancillary to some cause pending in a Court.

B. Other statutes in which the word "Court" is held not to include Circuit Judges.

There are many many other statutes in which the word "Court" is held to be not synonymous with "Judge." Reference to these may be found in,

8 Ency. of Law, Second Edition, 23.

With the above cases directly in point, however, it is hardly necessary to go exhaustively into these cases, however close the analogy may be between the statutes there construed and the statute in question. We wish to call particular attention, however, to a United States Supreme Court case. Under the writ of error statute (Revised Statutes, Section 709), a writ of error will go from the Supreme Court of the United States to the final judgment of the highest Court of the State in which a decision in the suit can be had. It would seem important that a writ of error should go under this statute to a Judge at Chambers, provided he was the highest tribunal of the State which could give judgment in any particular case, but the Supreme Court has decided that the word "Court" in the statute cannot be held to include a Judge at Chambers.

McKnight *vs.* James, 155 U. S., 685.

C. Principles on which other cases may be distinguished.

Neither of two Courts which have rendered adverse decisions in this matter has found a single case in point *contra* to those above cited. Some cases were cited by counsel in the Territorial Courts, but they are readily distinguishable upon one or more of the following grounds:

First. That a case may be in point, the constitution of the State must have a clause distributing the judicial power substantially in the language of Section 81 of our Organic Act.

For example: The Constitution of New York has no such clause, while the Constitution of Nebraska expressly includes Circuit Judges at Chambers as proper depositories of judicial power.

Second. The question involved must be a constitutional one. The discussion as to whether or not certain powers are vested in Circuit Judges at Chambers under

particular statutes of the several States has no value in this discussion. In Hawaii it is admitted that so far as the statute goes the judicial power in cases of Equity and Probate is so vested, but the question is as to the conflict of those statutes with the Organic Act.

Third. The power conferred upon Circuit Judges at Chambers by the legislature must be part of the judicial power.

Questions of contested elections or questions as to the adoption of children are not questions included in the term "judicial power" and may be vested by the legislature in any tribunal it pleases. In an Oregon case cited in the Court below, the question of counting votes in a contested election was vested in a Court composed of a County Clerk and two Justices of the Peace. In most States the legislature retains this question in its own hands, so far as its own members are concerned. Not being a judicial question it can delegate it to any tribunal it choses.

Fourth. Judicial power which is incident or ancillary to a case pending in some Court having jurisdiction thereof can be vested to a certain extent in Circuit Judges at Chambers. This is, perhaps, the most difficult class of cases to distinguish at first sight, although the difference is clear and fundamental. Circuit Judges at Chambers may be vested with power to issue preliminary writs, injunctions, appoint receivers, and other very important matters connected with the case, provided the final determination of the issues comes up in a Court which has jurisdiction of the case.

A rough test as to whether the statute construed in any given case has been or may be defended upon this ground is to be found by ascertaining whether the case reaches the Supreme Court of the State by appeal or

exceptions from some *Court*. If it does it shows that there is a Court having jurisdicition of the cause and which probably entered the final judgment or order so that the previous decisions of the Circuit Judges at Chambers were merely preliminary or incidental.

It is true that even in this class of cases the legislature may go too far and while preserving the form of a Court, actually give to the Judges at Chambers the final determination of vital issues, in which cases the Courts have not hesitated to declare the statutes unconstitutional.

The statutes of Hawaii, however, do not even pretend to invest jurisdicition in Equity or Probate in any Court. An appeal is taken direct from the decision of the Circuit Judge and the Circuit Court has no control over the case at any stage of the proceedings. If it is remanded it is remanded to the Circuit Judge and not to the Circuit Court. We unhesitatingly affirm that no statute of this kind arising under a similar constitutional provision has ever been held valid in any other jurisdiction.

D. Discussion of the decision of the Hawaiian Supreme Court.

The decision of the Hawaiian Supreme Court states that "the cases cited contain reasoning of great force in the support of the petitioners' contention" (Transcript, page 22.), but reaches the conclusion that there is something different or peculiar in the status of Hawaii with relation to its past judicial history which warrants the Court in refusing to apply this reasoning. This course

of argument necessitates a brief review of Hawaiian judicial history.

The Constitution of Kamehameha III, 1840;
The Constitution of Kamehameha III, 1852;
The Constitution of Kamehameha V, 1864;
The Constitution of Kalakana, 1887; and
The Constitution of the Republic, 1894.

These are published under the title "The Fundamental Law of Hawaii." The Constitution of Kalakana, 1887, can also be found in 5 Haw., 703; and the Constitution of the Republic, 1894, in 9 Haw., 732.

A fairly comprehensive view of the judiciary can be obtained by looking through the prefaces of the successive Hawaiian Reports. Previous to January 1, 1893, the Supreme Court justices tried cases at *nisi prius* and the same judges set *in banco* upon appeal. By the Judiciary Act of 1892, a portion of which has been quoted, the Supreme Court became purely an Appellate Court and *nisi prius* jurisdiction at law and in equity was distributed between the newly created Circuit Courts and Circuit Judges at Chambers.

See 8 Haw. preface,

Estate of Kealiiahonui, 9 Haw., 675.

Volumes 1 and 2 Hawaiian Reports, comprising the period 1847 and 1865, contain not only the decisions of the Supreme Court *in banco* on appeal but also those of single judges not appealed from.

Volumes 3, 4, 5 and 7 contain only decisions of the Supreme Court. Volume 6 contains the decision of Supreme Court judges at Chambers not appealed from, from 1866 to 1889. Volumes 9 to 12 inclusive contain the reports of the Supreme Court under the new judicial system, in

which the Supreme Court is purely appellate. Volumes 13 to 15 inclusive include decisions of the Territorial Supreme Court since annexation.

The principal arguments of the Territorial Supreme Court are:

(1) That Circuit Judges at Chambers may be regarded as Courts.

(2) That weight should be given to long-continued, unquestioned and contemporaneous construction.

(3) That Section 81 of the Organic Act being borrowed from the Constitution of the Republic, the construction placed upon it previously may be considered.

(4) That repeals by implication are not favored.

These will now be considered.

(1) The proposition that a Circuit Judge at Chambers may be regarded as a Court finds no support among the authorities. As shown in the cases cited above, the term "Judge at Chambers" has a definite and well recognized meaning. No statute in Hawaii makes a Court out of a Circuit Judge at Chambers. Taking but one instance from the many essentials of a Court, there is no statute regulating service of process from Circuit Judges at Chambers nor designating the time in which a defendant must answer. In the Courts of Record this matter is covered by statute and the time fixed at twenty days.

Civil Laws of 1897, Section 1217; Section 1238.

At Chambers the subject was formerly covered by a rule of Court reading:

"The time for answering shall be ten days after service, if the defendant resides on the Island of Oahu, and twenty days after service if made on either of the other islands."

9 Haw., 721.

Since the establishment of the Territorial Courts no rule has been established by the Circuit Judges at Chambers and the practice is not uniform. The original summons in the present action fixed a day certain, reading as follows:

"You are commanded to summon A. W. Carter, Annie Thelma K. Parker and Elizabeth J. Knight to appear on the 28th day of June A. D. 1904, before the Honorable George D. Gear, Second Judge at 10 o'clock A. M. of said day in the court-room at Honolulu, to answer the annexed motion, at which time the same is set down for hearing."

This clearly shows that the Circuit Judges at Chambers proceed summarily and have never been considered to be Courts of Record within Chapter 86 of the Civil Laws of 1897.

The Territorial Supreme Court says on this subject:

"Much, as to jurisdicition and procedure, is governed by what may be considered Hawaiian common law—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually and largely without the aid of statute."

(Transcript, page 25.)

Even at Common Law it is generally assumed that there must be a general grant of jurisdicition.

11 Cyc., 661.

A duly organized Court may perhaps contrive to enlarge its jurisdicition by a gradual assumption of power, but to argue that Circuit Judges at Chambers

can make themselves into Courts by assuming to be Courts seems to imply that they can lift themselves by their own judicial bootstraps.

(2) We submit that there has been no long continued, unquestioned and contemporaneous construction of Section 81 of the Organic Act. The judicial system prior to January 1, 1893, when the Supreme Court Justices sat at *nisi prius*, was so different from the present system that no comparisons can be drawn from it. It is true that there was a similar provision in the Constitutions of 1852, 1864 and 1887, and it is also true that during this period the Supreme Court justices at Chambers exercised full equity and probate jurisdiction. These Constitutions, however, contained the following identical provision:

"The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex officio* President of the House of Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdicition in equity or other cases as the law may confer upon him; his decisions being subject, however, to the revision of the Supreme Court on appeal."

Constitution 1852, Article 86.
Constitution 1864, Article 68.
Constitution 1887, Article 68.

It is manifest that the questions arising under this judicial system and under these constitutional provisions are very different from the question now before the Court and its decision could in no manner affect this period.

Since 1893 Circuit Judges at Chambers have exercised full equity and probate jurisdicition under a constitutional provision in many respects similar to Section 81 of the Organic Act, but there was no contem-

poraneous construction of this section. The plain truth is that the question was overlooked and never raised for the seven years the Constitution remained in force. Contemporaneous construction is undoubtedly of weight, but this does not mean that if a power exists unchallenged upon constitutional grounds for seven or even ten years, any prescription will run in its favor.

This whole matter reduces itself to an argument *ab inconvenienti*. While the decision of this Court would directly affect only transactions since 1900, it is felt that the same principle would be applied to all decisions since 1893. As to the weight which should be given to such an argument we merely refer to the history of the Probate Court of Utah. This Court, under the statutes of Utah, exercised jurisdiction, including divorce jurisdiction, from 1855 to 1874 when the Supreme Court of the United States in a case far less clear than the case at bar, decided the entire statute void.

Ferris *vs.* Higley, 20 Wall., 375.

(3) As to the argument that the provision of the Organic Act in question is borrowed from the Constitution of the Republic of Hawaii the Territorial Supreme Court says "It is also a general rule of construction that when one State borrows a law from another State, it also borrows the construction previously put upon it by the first State" (Transcript, page 23).

Even if we assume the major premise, that the section in question, which is similar to the constitutional provisions of many of the States of the Union, must be referred solely to the similar provision in the Constitution of the Republic of Hawaii, the minor premise is still unsound. *There has been no construction previously put*

upon the section by the Courts of the Republic of Hawaii. It is a manifest perversion of the principle above quoted to apply it to the present case. The principle would have to be revised to read:

"If a statute is passed by one State and its constitutionality remains unquestioned for seven years, such constitutionality cannot be attacked in any other State which borrows the same statute and constitutional provision." This is a manifest absurdity.

(4) "*Repeals by implication are not favored.*" This principle is usually applied to acts of successive legislatures. It has no application to an Act of Congress which stands in the relation of Constitution to the enactments of the Territorial Legislature. The Organic Act passed in 1900 cannot be said in any sense to "repeal" a subsequent Act of the Territorial Legislature as, for example, that portion of Act 16 of the Laws of 1903 conferring for the first time divorce jurisdiction upon Circuit Judges at Chambers. Yet this jurisdiction is undoubtedly void, because, having been previously vested in the Circuit Courts (Civil Laws 1897, Section 1144), it has not the advantage of the "contemporaneous construction" or "previous history" which are supposed to take Equity and Probate jurisdiction out of the usual rule. The question is not one of "repeal" but of testing the validity of a statute by the ordinary principles of Constitutional Law. We submit that under these principles the reasoning of the cases cited is decisive, and the statutes void.

Respectfully submitted,

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiffs in Error.